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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ELIAS GUERRERO NAVA, Defendant and Appellant.	E021958 (Super.Ct.No. CR-67147) O P I N I O N

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhart, Judge. Reversed.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Daniel E. Lungren, Attorneys General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Janelle M. Boustany, Supervising Deputy Attorney General, and Robert B. Shaw, Deputy Attorney General, for Plaintiff and Respondent.

SEE DISSENTING OPINION ATTACHED

In 1997, defendant Nava was convicted of 10 counts of committing a forcible lewd act on a child, in violation of Penal Code section 288, subdivision (b). He was sentenced to 80 years in prison. He appealed the judgment.

Our original opinion in this case, which affirmed the judgment, was filed on July 16, 1999. On October 23, 2001, our Supreme Court directed us to reconsider the opinion in the light of *People v. Cleveland* (2001) 25 Cal.4th 466. *Cleveland* concerns the standard a trial court should employ in discharging a juror during deliberations for failure to deliberate. Since this issue is determinative, we have focused on it in this opinion. After reconsideration, we conclude that the trial court erred and the judgment must be reversed.

DISMISSAL OF SOLE HOLDOUT JUROR DURING DELIBERATIONS

Defendant contends that the trial court erred in discharging the sole holdout juror during deliberations. We discuss the facts underlying each of the reasons which were given by the trial court as the basis for the discharge. We also discuss the legal sufficiency of each of those reasons, including the application of *Cleveland* to the alleged failure to deliberate.

1. The Facts. During deliberations, the bailiff reported that the foreman had told him that a juror was taking her notes home with her. At the same time, the foreman sent the trial court a note concerning the same juror: "We are at an impasse where one juror is using insanity as a defense when it was not brought into the court. This juror also uses sentiment, sympathy, public opinion, & public. [*Sic*] [¶] She also took notes out of the deliberation room & brought notes in. She also has trouble finding anyone guilty." (Original emphasis.)

The trial court interviewed the foreman who stated that, at the end of the previous day, the juror had torn some pages out of her juror's notebook and put them in her pocket. He believed she took them home. The foreman also believed that the juror had transcribed her notes onto a legal pad which she brought with her the next morning. The foreman also stated that the juror was using facts not in evidence in her discussions, and she was saying that defendant must be insane to say the things he said during his testimony. The foreman also had the opinion that the juror would have trouble finding anyone guilty.

Specifically, the foreman said: "She seems to be bringing a lot of facts that are not in evidence into her discussions. I've read personally about three or four times the information that says you're not to bring conjecture, sympathy, public opinion -- I have read that about four or five times here. [¶] The entire group -- people were starting to bring in, What about this? He must be crazy to do this. When that happens, I pretty much kind of say, That's not part of the evidence. That's not the facts. You cannot use that to determine guilt or innocence. That is not part of the facts -- part of the evidence. And part of her defense is, He must be insane to say something like this. [¶] And something that just came out a second ago, he said -- no, she said -- let me make sure I get this right. If he was on the stand and -- let me make sure I say this right. If he was on the stand and he said, No, I didn't do it, no, I didn't do it, then he's guilty. If he was on the stand and he said, Yes, yes, I did it, he's not guilty. He's just crazy. [¶] And then -- and she keeps going back and forth with this insanity thing. Oh, he must be crazy for saying something like this. And we keep trying to tell her that you can't assume that. There hasn't been any type of defense brought in that

said that he was insane. Therefore, we can't use that in coming to a verdict. That's kind of where we're at. She keeps bringing up this crazy issue."

The foreman also offered his opinion that the juror had a general concept in her mind that she couldn't find anyone guilty. He said: "She said this a couple times. 'I don't want to send an innocent person to jail. I'd rather let' -- I'm trying to think of the phrase that's commonly used -- I can't remember. But in my opinion, it doesn't sound like she could find anyone guilty."

The juror, a retired accountant, was then interviewed. She denied taking any trial notes home with her but stated: "I was writing down what I was going to do that evening and shopping, decorating trees, things like that, and I took them home with me." She admitted writing down some of her personal feelings but claimed she had thrown those pages away. She also admitted writing down some of her personal feelings at home and bringing a notepad from home into the jury deliberation room.

The trial court then inquired about the substance of the jury deliberations. When the juror was asked if she had expressed sympathy for defendant, she replied: "Very little. Not as much as the other people have." When asked if she had discussed with the other jurors the possibility of one not being fully mentally competent or being insane in doing a certain act, she replied: "I think almost everyone has made a comment like they weren't using their head on certain things." She was asked whether the idea of one's sanity had come into the discussion as to whether or not he should be found guilty or not guilty. She replied: "I think somebody made a comment about that as a joke. Just kidding. But, I mean, there's a lot of things being said as jokes."

Finally, the juror positively affirmed that she could find a person guilty on overwhelming evidence, which she defined as being without a reasonable doubt. The trial court then reviewed the reasonable doubt instruction with her, and she said she understood it and would follow it.

The juror also commented that "[T]he fellow that sort of appointed himself foreman hollered when I started tearing things out [of my notebook]. I stuck [the pages] back in. He also -- he doesn't seem to like me, and he goes around the table asking questions of everyone. When it comes to me, he just goes right on by me. And also he changes the time to come in. He said we'd come in at 9:00 this morning. Then I'm going down the hall, and one of the fellows [was] nice enough to holler at me and tell me he changed the time to 8:30. There is a problem going on there, and I don't appreciate it. So I imagine he's the one that's trying to say that I'm doing something against the Court's wishes or something."[1]

The prosecution then sought the juror's dismissal, arguing that her statements to the trial court were evasive, and she had violated instructions about taking notes home and bringing notes into the deliberation room.

Defense counsel opposed the motion, arguing that the juror was correct in stating that the foreman just did not like her, and was improperly trying to remove her from the jury.

The trial court found good cause for removal in (1) taking notes out of the deliberation room; (2) bringing materials into the deliberation room; and (3) "bringing in

[1] The other jurors were not interviewed to obtain their version of events.

other materials or at least other thoughts which are not part of the evidence, that being the sanity issue."

The trial court said, "I think all of those are bases for her to be removed for misconduct in that she has violated the admonitions and the specific instructions of the Court." In part, the trial court based its decision upon its belief that the juror lacked credibility due to her demeanor in answering questions.

2. The Removal of Notes From the Deliberation Room. Immediately prior to the opening statements, the trial court instructed the jury regarding the juror notebooks as follows: "You have been given notebooks and pens and you will be able to take notes, if you choose to do that. You will leave those notebooks in the courtroom at all times. You will not be taking them out of the courtroom until such time that you go to deliberate. [¶] Each afternoon those notebooks will be picked up and will be locked away in a closet so no one else will be looking at them. I promise you no one else will be looking at those notebooks. It's for your personal use only, but I do not want them taken out of the courtroom. [¶] . . . [¶] . . . Notes are for the notetaker's own personal use only to refresh his or her recollection of the evidence."

At the end of trial, the jury was instructed with a modified version of CALJIC No. 1.05. As given, the jury was told: "You have been given notebooks and pens. And you will be able to take those with you when you go into the deliberation room. [¶] Notes are only to aid your memory and should not take precedent (*sic*, should be precedence) over independent recollection. A juror who has not taken notes should rely on his or her recollection of the evidence and not be influenced by the fact that another juror or others

have taken notes. Notes are for the note-taker's own personal use in refreshing his or her recollection of the evidence. Should any discrepancy exist between a juror's recollection of the evidence and a juror's notes or between one juror's recollection and that of another, you may request the court reporter to read back the relevant testimony, and the transcript will prevail."

Finally, as the jury was retiring, the trial court said: "[P]lease go ahead and take all of your personal effects including the notebooks. Even if you haven't used them, you may want them during your deliberations."

One of the trial court's reasons for the dismissal of the sole holdout juror was that the juror had violated the court's instructions by taking her notes home. As noted above, the jury foreman had stated that the juror had removed four or five pages out of her notebook and put them in her pocket. He believed she had taken them home. The juror admitted that she had torn some pages out of the notebook and taken them home but she said the pages contained personal notes unrelated to the trial. She also said she had taken notes of her personal feelings during the trial, and she had thrown those away in the courthouse. At a later point, the juror said: "I was under the impression that these [notes] were our personal things that aren't read when we leave." The court responded: "Absolutely. They are not read. Once the trial is over, you are permitted to take those notes with you, or if you choose not to take them with you, they will be destroyed. No one will read them." The juror responded: "Well, I understood whenever we are through with them, we can discard them, and I assumed it was any time I want since it was my personal feelings. So maybe

there was a little misunderstanding on that because of the time element when they could be destroyed."

3. The Trial Court's Decision on the Notebook Issue. The trial court believed the foreman and disbelieved the juror. It found that she had removed "items" from the courtroom in violation of the admonitions and specific instructions of the court.

Giving due weight to the trial court's credibility determination, we accept that the juror tore four or five pages from her notebook and took them home. But, as is apparent from the foregoing, she was only told to leave notebooks in the courtroom. She was not told that removal of pages from the notebooks was impermissible. Instead, she was told that the notebooks were for her personal use. Nevertheless, we will assume that the juror violated the trial court's instruction regarding the use of the notebooks.

4. Legal Analysis of the Notebook Issue. The legal question presented by the foregoing facts is whether the trial court abused its discretion in finding good cause for removal of the sole holdout juror for violating the court's instruction regarding use of juror notebooks.

The People rely on *People v. Williams* (2001) 25 Cal.App.4th 441, a companion case to *Cleveland*. In *Williams*, our Supreme Court considered a juror's express refusal to follow the trial court's instructions regarding the crime of unlawful sexual intercourse with a minor because the juror did not believe such behavior should be criminal. (*Id.* at p. 444.) The juror thus refused to follow the trial court's instructions regarding the crime and was removed from the jury during deliberations. (*Id.* at pp. 446-447.) The juror's refusal raised the issue of jury nullification, i.e., a juror's alleged power to nullify the law in the

defendant's favor. (*Id*. at pp. 450-451.) But no such weighty issues are involved in the present case. Instead, we consider whether the relatively trivial and nonsubstantive violation here was a sufficient grounds for dismissal.

As *Williams* points out, the governing statute is Penal Code section 1089, which provides that a juror may be removed when the juror "upon other good cause shown to the court is found to be unable to perform his duty . . . . " Thus, a juror must agree to render a verdict according to the instructions of the court, and "[a] juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of Penal Code section 1089." (*People v. Williams*, *supra*, 25 Cal.4th 441, 448.) Thus, when a juror is unwilling or unable to follow the law, as stated by the court, the juror should be excused if the juror's inability or refusal to perform his or her duties appears in the record as a demonstrable reality. (*Id*. at p. 461.) In other words, the misconduct, and the good cause for removal, is generally shown by its effect on the deliberations: "A juror who votes to convict or acquit for reasons that violate the trial court's instructions on the law commits misconduct." (*Id*. at p. 464 (conc. opn. of Kennard, J.).)

No such effect was shown here. The juror did not refuse to follow any instruction of the trial court, and the dismissal of the sole holdout juror under these circumstances appears to be an attempt to obtain a verdict: "Thus, discharge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision. . . . [¶] . . . In this context, then, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was

unable to deliberate." (*People v. Cleveland, supra*, 25 Cal.4th 466, 487-488 (conc. opn. of Werdegar, J.).)

The violation here was trivial because no deliberate refusal to follow the court's instruction was shown, and the violation could not conceivably have had any effect on the jury's deliberations. Thus, the demonstrable reality test was not met.

Of course, there are many cases in which a violation of the court's instructions does not constitute a refusal to follow the law regarding the charged crimes, but the violation still constitutes good cause for discharge of the juror. Good cause may or may not involve misconduct.

The closest factual situation to the present situation is found in *People v. Thomas* (1994) 26 Cal.App.4th 1328. In that case, the juror refused to deliberate and "also took the notes he had made during the trial home with him in his socks despite the trial court's warning not to do so." (*Id.* at p. 1333.) Although the failure to deliberate was itself good cause for the juror's removal, the court said: "'[A] court may exercise its discretion to remove a juror for serious and wilful misconduct, such as . . . repeated violation of the court's instructions, even if this misconduct is "neutral" as between the parties and does not suggest bias toward either side.' (*People v. Daniels* (1991) 52 Cal.3d 815, 863-864 . . . .)" (*Ibid.*)[2]

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[2] We relied on *Thomas* in our July 16, 1999, opinion. However, the Supreme Court ordered us to review that opinion in light of *Cleveland*. In the original opinion, we found substantial evidence to support the trial court's conclusions. We therefore concluded that the trial court did not abuse its discretion in discharging the juror. But *Cleveland* makes it clear that "In light of [the] constitutional dimension to the problem, it is inappropriate to

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In *Daniels*, the juror had discussed the case with outsiders and was removed from the jury. Our Supreme Court found that the juror's repeated violations of the court's instructions constituted serious and willful misconduct which justified the juror's discharge. The court further found that "[m]isconduct raises a presumption of prejudice [citations], which unless rebutted will nullify the verdict." (*People v. Daniels, supra,* 52 Cal.3d 815, 864.) The court cited *People v. Holloway* (1990) 50 Cal.3d 1098 (disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1) "in which it was discovered after the guilt verdict that a juror, contrary to the court's instructions, read a newspaper article about the case. We found this to be misconduct raising a presumption of prejudice and, when the People were unable to rebut the presumption, we reversed the conviction. In *Holloway*, we observed that if the court had discovered the misconduct earlier, it could have removed the juror and avoided the necessity for retrial of the case. [Citation.]" (*People v. Daniels, supra,* 52 Cal.3d 815, 864.)

Other examples of cases in which good cause was found to dismiss a juror include *People v. Cunningham* (2001) 25 Cal.4th 926, 1029 ["The death of a juror's parent constitutes good cause to discharge the juror if it affects the juror's ability to perform his

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commit to the trial court—subject only to the deferential abuse-of-discretion standard of review on appeal—the important question of the substitution of jurors after deliberations have begun." (*People v. Cleveland, supra*, 25 Cal.4th 466, 487 (conc. opn. of Werdegar, J.).) For this reason, our Supreme Court emphasized adherence to the rule that the juror should be discharged only if it is shown to a demonstrable reality that the juror is unable or
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or her duties."]; and *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 [violation of court's repeated order not to discuss the case justified discharge]. The latter case contains numerous other instances in which good cause was found. (*Id.* at pp. 892-893.)

Notwithstanding the many cases in which good cause is found, *Williams* and *Cleveland* teach that a sole holdout juror should not be discharged during deliberations unless the juror's inability to perform his or her duties for any reason appears in the record as a demonstrable reality. (*People v. Williams, supra*, 25 Cal.4th 441, 461; *People v. Cleveland, supra*, 25 Cal.4th 466, 484.)

A single instance of the juror's removal of four or five pages from her notebook, standing alone, is not serious and willful misconduct, or repeated disregard of the court's instructions. The juror was clearly able and willing to follow the trial court's instructions. At most, the circumstances show a misunderstanding as to whether the juror was allowed to remove some pages from her notebook and take them home or discard them. This is a trivial violation of the court's instruction, and, without more, it is not serious and willful misconduct.

We therefore turn to the question of whether the two additional grounds found by the trial court add up to a total picture of good cause to discharge the juror under Penal Code section 1089 and *Cleveland*.

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unwilling to deliberate. (*Id.* at p. 484 (maj. opn. of George, C.J.).) Under this stricter standard of review, we now conclude that the trial court abused its discretion.

5. The Bringing of Notes into the Jury Room. The second ground cited by the trial court was bringing materials into the jury room. But the jurors were not told that they could not make notes of their thoughts at home and bring those notes into the deliberation room. The People argue that such a prohibition is implicit in the trial court's statement that "Everything you will need to know in order to reach an informed decision you will learn about in this courtroom" and its admonition that the jurors could only deliberate together. We disagree. The juror did not bring any extrinsic material into the jury room, except a notepad which she had used to record her thoughts for her own use during deliberations. Her writing down of her thoughts at home was not deliberation in violation of the court's instruction.

There is, therefore, no factual basis for the prosecutor's argument that the juror was not following the court's instructions in bringing her own notes into the deliberation room. We agree with defense counsel: "I don't believe there's any prohibition against a person in the privacy of their own home taking a yellow legal tablet and writing down their feelings and bringing that into the courtroom. People are allowed to bring their purses. People are allowed to bring their lunch. People are allowed to bring bottles of water. If she wants to bring pieces of paper where she's written her feelings, I don't think there's any prohibition against it."

As the juror asked: "What's the difference between writing notes and keeping it in your head?" The trial court responded: "There isn't any difference." If there is no such difference, the juror did not do anything wrong in writing down her thoughts and bringing the paper into the jury deliberation room to aid her in deliberations. She was certainly not

told that she could not bring personal notes of her own thoughts and feelings into the jury room for her own use. There is no evidence that the juror improperly consulted extrinsic sources, such as a dictionary, in violation of the court's instructions.

Since the juror did not violate any instructions in this regard, we find that this reason, standing alone, is not a valid ground for her discharge from the jury. We therefore turn to the crucial issue of whether the juror's actions during deliberations constituted good cause for discharge under *Cleveland*.

6. Bringing Up the Alleged Sanity Issue During Deliberations. As noted above, the third ground asserted by the trial court was that the juror was "bringing in other materials or at least other thoughts which are not part of the evidence, that being the sanity issue." This part of the trial court's decision raises the issue discussed in *People v. Cleveland, supra,* 25 Cal.4th 466, i.e., the standards applicable when the trial judge dismisses a sole holdout juror for failure to deliberate.

The discussion in *Cleveland* begins with the general principles of Penal Code section 1089. As noted above, that section provides that the trial court may order a juror discharged and replaced with an alternate if, upon a showing of good cause, the court determines that the juror is unable to perform his or her duty.[3] Our Supreme Court notes that the statute has been applied to permit the removal of a juror who refuses to deliberate.

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[3] Penal Code section 1089 states, in relevant part: "If, at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate . . . ."

However, it warns that the trial court's power to remove a juror, particularly a sole holdout juror, for refusal to deliberate must be exercised with caution in order to protect the sanctity of jury deliberations: "[A]n additional reason that does apply here is to '"assure[ ] the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes." [Citation.]' [Citation.]" (*People v. Cleveland*, *supra*, 25 Cal.4th 466, 475.)

Nevertheless, *Cleveland* makes it clear that the trial court may make a reasonable inquiry into allegations of misconduct during deliberations. (*People v. Cleveland*, *supra*, 25 Cal.4th 466, 476.) *Cleveland* discusses the circumstances under which such an inquiry should be made. It concludes this discussion as follows: "As several of the foregoing cases demonstrate, it often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations before making further [inquiries] that could intrude upon the sanctity of deliberations. It also is clear from the foregoing decisions that when reinstruction does not resolve the problem and the court is on notice that there may be grounds to discharge a juror during deliberations, it must conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist. [Citation.]" (*Id.* at p. 480.)

The *Cleveland* opinion then discusses three federal cases which address the issue of jurors who refuse to apply the law as stated in the instructions.[4] Our Supreme Court

[4] These cases are *U.S. v. Brown* (D.C. Cir. 1987) 823 F.2d 591, *U.S. v. Thomas* (2d Cir. 1997) 116 F.3d 606, and *U.S. v. Symington* (9th Cir. 1999) 195 F.3d 1080.

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summarizes this discussion by agreeing with those cases "that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the

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In *Brown*, the court agreed with the appellant's argument that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." (*U.S. v. Brown, supra,* 823 F.2d 591, 596.) In *Cleveland*, our Supreme Court said: "The court in *Brown* reversed the judgment of conviction, concluding that the record 'indicates a substantial possibility that [the juror] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction.' [Citation.]" (*People v. Cleveland, supra,* 25 Cal.4th 466, 481.)

In *Thomas*, a juror was accused of having a "predisposed disposition" and engaged in disruptive conduct in the deliberation room. (*U.S. v. Thomas, supra,* 116 F.3d 606, 611-612.) After interviews, the juror was removed. After a lengthy discussion of the reasons why juror nullification is just cause for dismissal, the court found insufficient evidence to establish just cause. (*Id.* at pp. 617-618.) In a passage quoted in *Cleveland*, the *Thomas* court emphasized the need to safeguard the sanctity and secrecy of jury deliberations, and the concomitant need for limiting inquiries of deliberating jurors. (*Thomas,* at pp. 618-619.) "The need to protect the secrecy of jury deliberations begins to limit the court's investigatory powers where the asserted basis for a deliberating juror's possible dismissal is the juror's alleged bias or partiality in joining or not joining the views of his colleagues." (*Id.* at pp. 620-621.) The court went on to say: "Where, however, as here, a presiding judge receives reports that a deliberating juror is intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations." (*Id.* at p. 621.) Finally, the court emphasized the heightened scrutiny needed when the juror is the lone holdout juror. It therefore adopted the rule that the court must deny the removal request "if the record evidence discloses any possibility that a complaint about a juror's conduct stems from the juror's view of the sufficiency of the government's evidence . . . ." (*Id.* at p. 622, internal quotation marks omitted.)

In *U.S. v. Symington* (9th Cir. 1999) 195 F.3d 1080, the court reversed the trial court's discharge of a holdout juror because "there was a reasonable possibility that [the juror]'s views on the merits of the case provided the impetus for her removal." (*Id.* at p. 1088, fn. omitted.) The court adopted the following guiding rule: "We hold that if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." (*Id.* at p. 1087, fn. omitted.)

As discussed above, *Cleveland* agrees with these cases, but declines to adopt the reasonable possibility standard.

prosecution's evidence." (*People v. Cleveland, supra,* 25 Cal.4th 466, 483.) But the court refused to adopt the standard stated in those cases and instead said: "[W]e adhere to established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate. [Citations.]" (*Id.* at p. 484.)

Tested by this standard, the inquiry here fails to meet it. No inability or refusal to deliberate was shown. Instead, the juror stated she was ready and willing to discuss the issues and apply the reasonable doubt standard.

The trial court's inquiry also impermissibly invaded the sanctity of jury deliberations. For example, the juror was asked if she had expressed sympathy toward the defendant. "[A] trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*People v. Cleveland, supra,* 25 Cal.4th 466, 485.)

The trial court inquired about, and based its decision on, the holdout juror's alleged injection of a sanity issue into the deliberations. The foreman was allowed to testify about

the content of the jury deliberations and the trial court accepted his testimony that the holdout juror kept bringing up a sanity issue. The trial court also inquired as to the general subject matter of the notes, and the holdout juror stated some of the substance of her notes and impressions in response to the trial court's questions. But such an inquiry into the mental processes of the juror is improper. (*People v. Cleveland, supra*, 25 Cal.4th 466, 475.)

"Many of the policy considerations underlying the rule prohibiting postverdict inquiries into the jurors' mental processes apply even more strongly when such inquiries are conducted during deliberations. Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*People v. Cleveland, supra*, 25 Cal.4th 466, 476.) As discussed below, these concerns are especially strong when the juror who is questioned about deliberative processes is the sole holdout juror.

The trial court equated the bringing up of a sanity issue with bringing extrinsic matter, such as a dictionary, into the jury room. But the two concepts are different. To define a sanity question as extrinsic, the court would have to determine what was intrinsic, i.e., what the jury could properly discuss in deliberations. To find misconduct, it would then have to determine if the bounds of proper discussion had been exceeded. In other words, the trial court would have to improperly inject itself into the substance of the deliberations in order to find misconduct.

The trial court accepted the foreman's statement and believed that, by saying defendant must be crazy, the holdout juror was not following the instruction which told the jury that it should not be influenced by conjecture or sympathy for defendant. But even accepting the foreman's statement that the juror said that defendant must have been crazy to say or do certain things, the juror's statement does not amount to bringing extrinsic material into the jury room. A layman juror's comment that defendant must have been crazy to do certain things does not mean that the juror was saying that the defendant was not guilty under the legal concept of insanity because the jury necessarily had to consider the defendant's state of mind when the crimes were allegedly committed. Specifically, the charged crime, forcible lewd acts on a child under age 14 (Pen. Code, § 288, subd. (b)(1)), has a specific intent element. The jury was therefore instructed that it had to find that "[t]he touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child." In examining defendant's testimony in this regard during deliberations, the jury had to consider defendant's state of mind. A juror's statement that defendant must have been crazy to do certain things at certain times might well have been a comment on defendant's lust overcoming his prudence or caution, rather than a statement that he was not guilty because he was insane.[5]

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[5] The People also argue that the juror also violated the court's instructions by injecting a sanity issue into deliberations because the court instructed the jury not to "consider or discuss facts as to which there has been no evidence." However, as discussed above, the discussion may have been in the context of a proper discussion regarding the mental element of the charged offenses. The juror was only discussing her opinion regarding defendant's actions and was not injecting a fact into the discussions. We also note that it would be difficult to establish a violation of this instruction without further

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Thus, this is not a case in which the mere making of the statement is good cause for dismissal from the jury. As *Cleveland* states, "We held in *People v. Hedgecock* (1990) 51 Cal.3d 395, 418 . . . that jurors could be compelled to testify at a postverdict evidentiary hearing regarding allegations of juror misconduct, but observed that 'to avoid a chilling effect on the jury's deliberations, a trial court may decline to require jurors to testify when the testimony will relate primarily to the *content* of the jury deliberations.' We stated: 'In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible. [Citation.] But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.' [Citation.]" (*People v. Cleveland*, *supra*, 25 Cal.4th 466, 484-485.) Such a rare circumstance is not present here.

At most, this is a case in which the juror's logic was faulty, but *Cleveland* makes it clear that faulty deliberation is not a refusal to deliberate that would justify removal: "The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence

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intrusion into the mental process of the jury and the content of the deliberations. For this reason, we focus on *Cleveland* and not *Williams*. *Williams* is also inapplicable because the juror here did not refuse to follow the court's instructions but instead expressed a willingness to follow instructions.

shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (*People v. Cleveland, supra,* 25 Cal.4th 466, 485.)

The holdout juror in this case did not refuse to deliberate, nor did she refuse to follow the trial court's instructions. Thus, even fully crediting the foreman's statements, there was insufficient evidence to establish that there was a demonstrable reality that the juror was unable or unwilling to deliberate. (*People v. Cleveland, supra,* 25 Cal.4th 466, 484-485.)

The foreman in this case also expressed the view that the holdout juror "has trouble finding anyone guilty." The trial court interpreted this phrase as follows: "He says, 'She is' --- 'She also has trouble finding anyone guilty,' which is also a violation -- not a violation. That's not the right word, but perhaps she wasn't truthful. This indicates perhaps she wasn't truthful during voir dire indicating that she could be fair because she can't be fair if she can never find someone guilty." Defense counsel responded: "Well, my concern is that I think that this is a vehicle that the foreman is trying to use to coerce a guilty verdict out of this juror because it appears that her analysis of the facts is different from his own. . . ."

The trial court vigorously questioned the juror on this issue. It inquired: "[D]o you have the feeling that you could . . . , depending upon the evidence[,] that you could find someone guilty of a crime?" The juror responded: "Oh, yes. Oh yes, I could. I most

definitely could. But it would have to be overwhelming evidence." This answer led to a discussion about the reasonable doubt instruction. The trial court reread the reasonable doubt instruction to the juror and she stated that she agreed with that definition and could follow it. In other words, the juror expressly agreed to follow the court's instructions.

A person who finds himself or herself to be a sole holdout juror faces pressures to agree with the other jurors. Sometimes these pressures are intense, and sometimes they lead to the juror's dismissal for failure to deliberate. But *Cleveland* teaches us that a failure to deliberate well is not a failure to deliberate. (*People v. Cleveland, supra,* 25 Cal.4th 466, 485.) The dismissal of a sole holdout juror should be reserved for cases in which the juror simply refuses to deliberate at all, and the power of dismissal should not and cannot be used simply to coerce a conviction. In this case, the jury convicted defendant on 10 counts in about an hour after the alternate juror was seated.

We fully agree with Justice Werdegar's perceptive concurring opinion in *Cleveland*: "[D]ischarge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision. In light of this constitutional dimension to the problem, it is inappropriate to commit to the trial court—subject only to the deferential abuse-of-discretion standard of review on appeal—the important question of the substitution of jurors after deliberations have begun. [¶] Recognizing the need for additional protection of an accused's constitutional rights, we more accurately have explained that, to affirm a trial court's decision to discharge a sitting juror, '[the] juror's inability to perform as a juror must "appear in the record *as a demonstrable reality*."' [Citations.] Such language

indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror. In this context, then, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate." (*People v. Cleveland, supra,* 25 Cal.4th 466, 487-488 (conc. opn. of Werdegar, J.).)

The test reaffirmed by *Cleveland* is that a juror should be discharged only if it appears as a "demonstrable reality" that the juror is unable or unwilling to deliberate. (*People v. Cleveland*, *supra*, 25 Cal.4th 466, 484.) No such reality was shown here. Accordingly "we conclude that the trial court abused its discretion in excusing Juror No. [9], because the record before us does not establish 'as a demonstrable reality' that Juror No. [9] refused to deliberate. . . . [¶] . . . [¶] . . . This error is prejudicial and requires reversal of the judgment." (*Id.* at pp. 485-486.)

DISPOSITION

The judgment is reversed.

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HOLLENHORST
J.

I concur:

WARD
J.

RAMIREZ, P. J.

I respectfully dissent from the majority's conclusion that the trial court violated the dictates of *People v. Cleveland* (2001) 25 Cal.4th 466 (*Cleveland*) in dismissing Juror No. 9.

I begin by noting that, in *Cleveland*, the California Supreme Court did not overturn the trial court's dismissal of the juror because of the inquiry the trial court undertook in determining if misconduct occurred. Rather, the *Cleveland* court determined that the trial court's conclusion that the juror failed to deliberate was unsupported by the evidence presented. That evidence showed only that the juror did not feel that the evidence was sufficient to support a guilty verdict. (*Cleveland, supra,* 25 Cal.4th at pp. 485-486.) Although the *Cleveland* trial court did not dismiss the juror for a failure to follow instructions, the California Supreme Court commented that the accusation of this by the jury foreperson was also unfounded. This was because, again, the only "problem" was the juror's conclusion that the evidence was insufficient to convict. (*Id*. at p. 486.)

The majority concludes that there was no demonstrable reality that Juror No. 9 was unable or refused to deliberate. (Maj. opn. *ante*, at p. 8.) I have no quarrel with this statement. However, a refusal to deliberate was not the allegation made by the foreperson here and was not the basis of the trial court's dismissal of Juror No. 9, as the majority itself notes. (Maj. opn., *ante*, at p. 18.) Rather, it was the juror's consideration of extrinsic

matters, i.e., the insanity of the defendant.[1] There is a significant difference between a refusal to deliberate and consideration of extrinsic matters. *Cleveland* essentially dealt with the former. This case deals exclusively with the latter.

The foreperson testified to statements made by Juror No. 9 from which a reasonable person could infer that she was considering the defendant's sanity in determining his guilt. Juror No. 9, on the other hand, asserted that the only discussions that had occurred about the possibility of someone being not fully mentally competent or insane in doing a certain act were comments "by almost everyone" that the defendant had not used appropriate judgment at certain times. When asked by the trial court if insanity had been discussed in connection with finding the defendant guilty or not guilty, she replied that she thought that somebody had made a comment about that as a joke, but they were just kidding. Her statements contradicted the foreperson's. The trial judge, in a better position to judge their credibility than this court, found the foreperson to be believable and Juror No. 9 not believable. For this court to cast aside the trial court's credibility assessment, without finding that insufficient evidence supported it, is improper. (See *People v. Beeler* (1995) 9 Cal.4th 953, 989; *People v. Johnson* (1993) 6 Cal.4th 1, 21; see also *People v. Lucas* (1995) 12 Cal.4th 415, 489.)

The analysis the majority undertakes in an effort to show that Juror No. 9 was

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[1] Likewise, because the trial court did not dismiss the juror based on the foreperson's allegation that she was unable to find anyone guilty, I do not understand the majority's discussion of this. (Maj. opn. *ante*, at pp. 22-23.)

considering the defendant's sanity for the limited purpose of determining whether he had the intent to commit the charged offenses (maj. opn., *ante*, pp. 19-20) ignores the statements of the foreperson, who offered the only evidence that sanity was a non-jocular topic of discussion in the deliberation room. It is clear from the sum and substances of his comments that Juror No. 9 was not considering the defendant's sanity on this narrow issue (never mind that there was no evidence adduced at trial as to his sanity or lack thereof), but she had concluded that if the defendant said, "['Yes, I did it'], *he's not guilty*. He's just crazy." In other words, if the defendant did it, he must be insane, therefore he is not guilty. The majority vastly understates the foreperson's version of events by reporting merely that he said that Juror No. 9 "said . . . [the] defendant must have been crazy to say or do certain things." (Maj. opn., *ante*, p. 19.) What he said was that Juror No. 9 "*ke[pt] going back and forth* with this insanity thing. . . . And we *ke[pt] trying* to tell her[,] . . . ['We can't use that *in coming to a verdict*. . . .'] [S]he *continue[d] to comment* about he must be insane." Moreover and of more importance is the conclusion Juror No. 9 derived from the defendant being crazy. The conclusion, *out of Juror No. 9's own mouth*, is that if the defendant committed these crimes, he's crazy but he's not guilty.

I also disagree with the majority's conclusion that the trial court impermissibly invaded the sanctity of jury deliberations in its inquiry into the allegation that Juror No. 9 was considering the defendant's insanity. (Maj. opn. *ante*, at p. 18.) The majority asserts that the trial court should not have asked Juror No. 9 if she had expressed sympathy for the defendant. However, *Cleveland*, although in dicta, confirms the well-established rule that it is proper for a trial court to inquire as to "'statements made . . . within the jury room[]' . . .

when 'the very making of the statement sought to be admitted would itself constitute misconduct.' [Citation.]" (*Cleveland, supra*, 25 Cal.4th at p. 484.) If Juror No. 9 expressed sympathy for the defendant, the trial court needed to know this to determine whether she was disobeying instructions given her to not be swayed by sympathy.

I disagree with the majority's assertion that there is a difference between Juror No. 9's injection of the defendant's insanity into discussions of his guilt and a juror bringing a dictionary into the deliberation room. (Maj. opn., *ante*, p. 19.) There is no difference. In both cases, the juror is considering matters that were not in evidence a trial, thereby violating an instruction to do otherwise. I also disagree with what appears to be the majority's conclusion that any time a trial judge inquires into an accusation that a juror is discussing extrinsic matters, it improperly "inject[s] itself into the substance of the deliberations" by determining what are proper topics of discussion and what are not. (Maj. opn., *ante*, p. 19.) The trial court's questions to Juror No. 9 were not directed at revealing the give and take of the deliberative process. They were aimed at determining whether Juror No. 9 was considering the defendant's insanity, clearly, an extrinsic matter not addressed by the evidence presented at trial. The only proper way the trial court could determine whether Juror No. 9 was considering sanity was to *ask her what she said on the subject during deliberations,* which is exactly what this judge did. If a trial court can't do that, then it is powerless to address any accusation that a juror is considering extrinsic matters.

As to the trial court's interaction with the jury foreperson, I note that the latter volunteered the initial information about Juror No. 9's considering the defendant's sanity without the trial court's having to ask a single question about it. Under these circumstances,

I have great difficulty with the majority's criticism of how the trial court conducted itself.

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RAMIREZ

P. J.